

STATUS OF CLAIMS:

Claims 1-43 are presently pending in the application.

REMARKS

Applicants provisionally elect with traverse to prosecute the invention of Group I, claims 1-15. Claims 16-43 are withdrawn from consideration. Applicants reserve the rights to reintroduce the non-elected claims in the event that claims in Group I are allowable, or to prosecute the non-elected subject matter in a divisional application.

Applicants respectfully submit that the inventorship remains the same following the election.

Claim Rejections - 35 U.S.C. § 102(b)

Claims 1 to 15 stand rejected under 35 U.S.C. § 102(b) as anticipated by Paul *et al.* (US 5,292,538; "the '538 patent"). According to the Examiner, Paul *et al.* discloses a nutritional composition comprising glucose polymers, lactalbumin (whey protein), amino acid ligands (e.g. zinc arginate), potassium, phosphorus, alpha-ketoglutarate (within the claimed range), lipoic acid (within the claimed range), vitamin C and inositol.

Paul's reference simply does not anticipates the claims in this application.

Paul *et al.* teaches lipoic acid as an **optional** antioxidant. It fails to provide any teaching, suggestion or motivation for making a food supplement for increasing lean muscle mass and strength. For example, the composition listed in the table (col. 9-10, lines 57-68 and col. 11-12, lines 1-40) has eight formulations, of which four formulations do not even contain lipoic acid at all. Lipoic acid only present in the other four formulations in amounts of 64.1 µg (formulation I), 88.0 µg (formulation II), 56.0 µg (formulation VII) and 80.0 µg (formulation VIII). Thus, Paul *et al.* actually teaches that the nutritional composition

works in anabolic physiology even **in the absence of** lipoic acid.

Paul et al. merely teaches a **relatively smaller** amount of lipoic acid (i.e., 64.1-88.0 ug) (col. 9-10, Table)

optimization

Paul et al. teaches a **different** intended use of a nutritional composition (i.e., intended use does not w/H₂O, etc.)
intended for anabolic physiology). Stated simply, Paul's invention has a different intended result.

Paul's formulation **must** contain magnesium . To this end, Paul et al. expressly states in the Background section of the '538 patent "Further, the prior art formulas do not contain physiological significant levels of magnesium in bioavailable form. Though magnesium is essential to maximum endurance and many athletes are magnesium deficient, potent levels of magnesium are not included in the prior art formulas since such levels are in form not readily assimilated by the body and usually cause diarrhea or other gastrointestinal disorders." See col. 2, lines 1-9. Paul et al. continues to describe in '538 patent specification pertinent to the formulation, Paul et al. expressly states "... contains significant levels of the mineral magnesium" (col. 9, line 29) and independent claim 1 of the '538 patent recites "A fructose/glucose/protein blend composition comprising...(e) from 50 to 500x(10-3) parts of magnesium...wherein the magnesium is present as an amino acid chelate formed from said amino ligand source wherein the molar ratio of amino acid ligand to magnesium in said chelate is at least 1:1." There is no showing that a composition that contains magnesium (like that of Paul's formulation) is operable in increasing lean muscle

mass and strength.

Given that Paul's reference merely teaches an optional use of lipoic acid in a relatively smaller amount for a different use and that Paul's formulation must require magnesium to operate, Paul's references cannot anticipate the claims of the present invention. Applicants respectfully urge the Examiner to withdraw the 102 rejection.

CONCLUSION

In view of the foregoing, Applicant respectfully submits that all the pending claims are in condition of allowance. Early and favorable action by the Examiner is earnestly solicited. If the Examiner believes that issues may be resolved by a telephone interview, the Examiner is urged to telephone the undersigned at (212) 908-6018.

The Commissioner is authorized to charge any required fees which may be due to Deposit Account No.11-0600.

RESPECTFULLY SUBMITTED
KENYON & KENYON

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